IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 4, 2007

STATE OF TENNESSEE v. CHRISTOPHER LEVON GROSS

Direct Appeal from the Circuit Court for Bedford County
No. 16075 Lee Russell, Judge

No. M2007-00728-CCA-R3-CD - Filed January 22, 2008

A Bedford County jury found the Defendant, Christopher Levon Gross, guilty of felony possession of a firearm and theft of property valued at less than $500. The trial court sentenced him to two years of incarceration as a Range I offender, consecutive to eleven months, twenty-nine days of incarceration. On appeal, the Defendant raises two issues: (1) the State presented insufficient evidence to support the convictions; and (2) the trial court improperly sentenced him. Finding no error, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and DAVID G. HAYES, J., joined.

Andrew Jackson Dearing, III, Shelbyville, Tennessee, for the Appellant, Christopher Levon Gross.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Jennifer L. Smith, Associate Deputy Attorney General; Chuck Crawford, District Attorney General; Michael D. Raddles, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

At the trial, the following evidence was presented: John Mark Leverette testified that he and most of his family went out of town in March 2006, and that when they returned, his gun, camera, and camera charger were missing from his house. Leverette reported to the sheriff's department that the gun, having a replacement value of $550, was missing.

Cody King, a patrolman with the Shelbyville Police Department, testified that on April 11, 2006, he stopped a Dodge Durango vehicle for running a stop sign and asked for the passengers' names. Officer King said the driver, DeMarco Edwards, admitted he did not have a driver's license

and identified one of the passengers as the Defendant. Officer King stated that he ran the Defendant's name through the warrant system, which alerted other officers to come to the scene. After another officer responded, Officer King saw the Defendant, who was sitting in the seat behind the driver, "climb[] over the other passenger on the right side of the vehicle, [and] open[] the door . . . to exit the vehicle." The officers arrested three of the four individuals in the car, including Edwards and the Defendant.

Officer King stated the police searched the vehicle once all passengers exited it, and they found a gun, eventually identified as the one reported stolen from the victim, Leverette, "behind the [Defendant['s seat] over his right shoulder" in the "cargo area" of the vehicle. He clarified that the gun "was right up next to [the back of the seat]." Officer King testified that he picked up the gun without gloves and that no one in the vehicle claimed to own the gun. On cross-examination, Officer King said the police did not find contraband on the Defendant when they searched him. Additionally, he agreed that the police found the gun in a "storage compartment" in the vehicle. He stated that "there was quite a bit of stuff" in the cargo area but that it was "mainly junk." Moreover, he testified that the back seat was a bench seat, as opposed to separate bucket seats.

Jeremey Leverette (no relation to the victim, John Mark Leverette) testified that he was riding in a friend's vehicle, the Dodge Durango at issue, on the night of April 11, 2006, and that neither he nor his friend had a handgun. Leverette stated that they later picked up two other individuals, Edwards and the Defendant, with Edwards then driving the vehicle. Leverette said he sat in the backseat with the Defendant and never saw a gun. He noted that when the police stopped them, the Defendant wanted to leave the vehicle because he had a probation violation warrant out for his arrest. Leverette stated that, when the Defendant tried exiting the vehicle, the police pointed a gun at them, and the Defendant remained in his seat. Leverette testified that he saw the police find a gun, which did not belong to him, behind the bench seat he shared with the Defendant. On cross-examination, Leverette said he greeted the Defendant with a handshake when the Defendant climbed into the vehicle, and he did not see a gun on the Defendant. Leverette stated the Defendant could not exit the vehicle from his own door because of the child safety locks. Leverette also testified that the cargo area, where the gun was found, had "a whole bunch of stuff" in it, like "paint buckets, . . . a paintball gun, [and] . . . clothes hangers."

Elizabeth Reid, a Special Agent Forensic Scientist specializing in latent print examination at the Tennessee Bureau of Investigation, testified that she examined the gun and the gun's magazine for fingerprints. She compared the unknown prints found on the gun and the magazine with the Defendant's prints, but she did not find a match. Reid then explained the several ways that a person could handle something and not leave a finger or palm print on it, which included if someone else picked up the object later and left his or her own prints on top of the ones already on the object. On cross-examination, Reid admitted that she did not test the fingerprints found on the gun against the other passengers' prints.

After the evidence was presented, the Defendant stipulated to a conviction for the sale of a Schedule II drug. The jury found the Defendant guilty of felony possession of a firearm and theft

of property valued at less than $500. The trial court held a sentencing hearing, at which neither side presented witnesses, and sentenced the defendant to two years of incarceration, consecutive to eleven months and twenty-nine days of incarceration for misdemeanor theft.

II. Analysis

On appeal, the Defendant raises two issues: (1) the State presented insufficient evidence to support the convictions; and (2) the trial court improperly sentenced him.

A. Sufficiency of Evidence

The Defendant contends that the evidence does not support convictions for felony possession of a firearm or theft of property over $500. He specifically claims the evidence was purely circumstantial and did not rise to the level needed to convict him. The State counters that the circumstantial evidence was weighed by the jury and that the facts found by the jury support the convictions.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). A conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). The jury decides the weight to be given to circumstantial evidence, and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. D. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

The Defendant was convicted of felony possession of a firearm and theft of property valued at less than $500. As indicated, the elements of felony possession of a firearm are "possess[ing] a handgun and . . . (B) . . . [a] convict[ion] of a felony drug offense." T.C.A. § 39-17-1307(b)(1)(B)(2006).

Theft requires that "a person . . with intent to deprive the owner of property, . . knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103(2006). "Control" means "to exercise power or influence over." *Black's Law Dictionary* (8th ed. 2004). Theft may also be inferred by the mere possession of recently stolen goods. *State v. Tuttle*, 914 S.W.2d 926, 932 (Tenn. Crim. App. 1995); *State v. Hatchett*, 560 S.W.2d 627, 629 (Tenn. 1987).

The legal concept of "possession" runs through both offenses, and there are two types of possession: actual and constructive. Actual possession is when "[a] person . . . knowingly has direct physical control over a thing, at a given time." *State v. Edmondson*, 231 S.W.3d 925, 928 (Tenn. 2007). In contrast, constructive possession is when someone without actual possession still "knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons." *Id*. Cases discussing the phrase "exercise dominion or control," in the context of a person being near contraband and being in a vehicle, require that the person constructively possessing the contraband either own the vehicle or be driving it. *State v. Brown*, 915 S.W.2d 3, 8 (Tenn. Crim. App. 1995); *Tuttle*, 914 S.W.2d at 932; *see State v. Tommy William Davis*, No. E2002-005110CCAOR30CD, 2003 WL 649113, at *6 (Tenn. Crim. App., at Knoxville, Feb. 28, 2003), *perm. app. denied* (Tenn. Jun. 30, 2003). Additionally, cases draw a distinction between constructive possession and being in the proximity of contraband. "The mere presence of a person in an area where [contraband is] discovered is not, alone, sufficient to support a finding that the person possessed the [contraband]." *State v. Transou*, 928 S.W.2d 949, 956 (Tenn. Crim. App. 1996) (citing *Harris v. Blackburn*, 646 F.2d 904, 906, (5th Cir. 1981)). "Likewise, mere association with a person who does in fact control the [contraband] or property

where the [contraband is] discovered is insufficient to support a finding that the person possessed the [contraband]." *Id*

Viewing the facts in the light most favorable to the State, we conclude that the evidence sufficiently supports the Defendant's convictions. We first address the offense of possession of a handgun. The police found the Defendant in a vehicle's back seat, with a gun "behind the [D]efendant over his right shoulder." Moreover, the gun was "right up next to [the back of the seat]." When the police officer gestured at trial about the gun's location, he demonstrated an area within the Defendant's reach. This supports a jury verdict that the Defendant had actual possession of the gun. While the Defendant was in the presence of the gun, he lacked control over the vehicle and did not own it; however, he could have easily reached over his shoulder and retrieved the gun. Satisfying yet another element, the Defendant stipulated that he had a felony drug conviction. The combination of having actual possession of the gun and having a prior felony drug conviction sufficiently support the Defendant's conviction for possession of a handgun.

We also conclude the evidence sufficiently supports the Defendant's conviction for theft. The gun was stolen property, reported missing by the victim. The gun's replacement value was cited as $550, so the older, used gun's value could have been less than $500. Relying on our analysis for possession, the Defendant possessed the gun. Combining that conclusion and the *Tuttle* and *Hatchett* cases, we may infer that the Defendant exercised control over the gun and that he obtained the gun through theft. *Tuttle*, 914 S.W.2d at 932; *Hatchett*, 560 S.W.2d at 629. We conclude that the evidence, when taken in a light most favorable to the State, satisfies the requirements for the Defendant's convictions, so he is not entitled to relief on this issue.

B. Consecutive Sentencing

The Defendant claims that the trial court erred when it ordered his sentences to run consecutively and when it considered one of his prior felonies. The State counters that the court properly sentenced the Defendant to consecutive sentences under Tennessee Code Annotated section 40-35-115 (b)(2) and (6) and that prior convictions may be used in sentencing.

When a defendant challenges the length, range or manner of service of a sentence, this Court conducts a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentence is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*,

900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. M. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a *de novo* review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

When sentencing the Defendant, the trial court began by considering the Defendant's one felony conviction as an adult, making him a Range I offender for the Class E felony of possession of a firearm. The trial court found the Defendant's criminal history, which it listed by offense in reverse chronological order, going back to a juvenile adjudication for aggravated assault at age ten, as an enhancement factor. The trial court found the Defendant's numerous juvenile adjudications, which, if committed as an adult, would have constituted a felony, as an enhancement factor. Moreover, the trial court found as an enhancement factor that the Defendant's probation had been revoked several times, including when he committed additional offenses while on probation. The trial court did not find any mitigating factors and sentenced the Defendant to two years of incarceration for the felony possession of a firearm conviction. Next, the trial court addressed the theft offense, which is a Class A misdemeanor, and it considered the same factors as it did for the felony and set the sentence at eleven months, twenty-nine days of incarceration.

The Defendant alleges that he should have been sentenced to the minimum because the court "applied statutory enhancement factors . . . not found by the jury." The Defendant committed the crimes in March 2006, which was about nine months after the new sentencing statute went into effect on June 7, 2005. T.C.A. § 40-35-101, et al. (2006). As such, the trial court sentenced him under the reformed sentencing laws, which give the court wide discretion when enhancing a sentence. *See id.* Given the timing of the Defendant's crimes, the trial court was not required to utilize a *Blakely*, *Gomez*, or *Schiefelbein* analysis. *Blakely v. Washington*, 542 U.S. 296 (2004); *State v. Gomez*, — S.W.3d —, 2007 WL 2917726 (Tenn. 2007); *State v. Schiefelbein*, 230 S.W.3d 88 (Tenn. Crim. App. 2007). We conclude the trial court did not err in enhancing the Defendant's sentence above the minimum.

The Defendant also alleges that the trial court erroneously ordered consecutive sentences instead of concurrent sentences. According to Tennessee Code Annotated section 40-35-115, the trial court may sentence a defendant to consecutive sentences if it "finds by a preponderance of the evidence that: . . . (6) the defendant is sentenced for an offense committed while on probation." The Defendant was on probation for a drug felony when he committed his most recent offenses. Thus, the trial court properly sentenced the Defendant to consecutive sentences. The Defendant is not entitled to relief on this issue.

III. Conclusion

We conclude that the Defendant's conviction was supported by sufficient evidence, and the trial court properly sentenced him. Based on the foregoing reasoning and authorities, we affirm the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE